IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1247

IMPERIAL DISTRIBUTORS, INC., ET AL
Petitioners,

v.

HONORABLE RAYMOND J. PETTINE,
UNITED STATES DISTRICT COURT
District of Rhode Island

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF
TO BRIEF IN OPPOSITION

JOHN SHEEHAN, ESQ.
906 Industrial Bank Bldg.
Providence, Rhode Island 02903
(401) 351-1190
Of Counsel,
For Petitioners

WILLIAM E. SEEKFORD, ESQ.
Suite 1302 Towson Towers
Towson, Maryland 21204
(301) 821-6868
Counsel for Petitioners

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1247

IMPERIAL DISTRIBUTORS, INC., ET AL
Petitioners,

v.

HONORABLE RAYMOND J. PETTINE,
UNITED STATES DISTRICT COURT
District of Rhode Island

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF
TO BRIEF IN OPPOSITION

STATEMENT IN REPLY

The Solicitor General has filed in his Brief in Opposition a section captioned "Statement" which cannot go unchallenged by Petitioners. Therefore the Petitioners herein will correct the record so the Court may be fully and accurately apprised of the full circumstances.

First, under footnote number one on page two of the government's brief it appears the Solicitor General has filed a copy of the Boston Search "Order" Affidavit with the Clerk of this Court. This is a surprisingly complete reversal of the governments prior position even though no copy of such affidavit was served upon counsel for Petitioners herein.

These Petitioners have unsuccessfully sought to obtain a copy of the Massachusetts Affidavit (the foundation of all federal action arising thereafter) since March 3, 1978 or three days after the seizure was initiated. The Court in Massachusetts denied Petitioners motion for a copy of that affidavit which order of refusal was in writing dated March 3, 1978. On March 20, 1978 the federal Court in Massachusetts again denied a request for a copy of the affidavit ordering that the affidavit be "impounded" instead until the grand jury proceeding was completed. On Thursday, April 6, 1978 certified copies of the federal Court record in Massachusetts was obtained but again no affidavit was made available. During the entire trial in Providence the issue of the Court suppressed affidavit was before the Court, at no time did the government produce a copy or permit Petitioners or the Rhode Island federal Court to view it for probable cause.

Secondly, these Petitioners will promptly apply to the Clerk of this Court so as to obtain a copy of the affidavit as filed and review the same for the first time.

In the interim, these Petitioners will take the same liberty and deposit with the Clerk of this Court a copy of the "Order" of the federal Court in Massachusetts issued upon the basis of that affidavit. This "Order" was merely to search "in order to determine whether or not there exists therein" obscene

materials of the same tenor as three named magazines. Clearly this was an order to search for probable cause to seize and of materials not viewed by that Court. This was the foundation of the Rhode Island seizure complained of herein.

This Court should review both documents so as to make a considered determination with all the surrounding facts.

ARGUMENT

I.

The government, in their brief (pp. 3-4) states that the district court recognized that a grand jury investigation in another district might soon lead to the institution of criminal charges. It is just as appropriate, Petitioners think, to consider that at the time of that decision the investigation had been unfruitful for a period of ten months. And this Court can take cognizance of the fact that four additional months have lapsed without indictment together with the fact that the investigation will not be concluded for possibly three additional months. No one can guarantee the results of it in any event, or that any indictment may issue.

Therefore Rule 41(e) has been virtually sterilized of any force and effect in these circumstances. If these Petitioners cannot obtain adjudication of their substantial constitutional claims from February 1978 to at least July of 1979, or later, under Rule 41(e) then the Rule as written is in all material aspects just mere words.

Just as important is the fact that Eagle Productions, Ltd. had not conducted any business of any nature in Massachusetts for at least a year before the seizure as well as at the time

of the seizure. Also the seized materials included the business records of a motion picture theater corporation that had its business premises in Rhode Island and conducted no business in any other state. The business records of a realty corporation, having no dealings with expression materials was another company who had its records seized indiscriminately here.

II.

The government states that much of the delay of the grand jury is attributable to Petitioner Guarino's contempt of court for refusing to turn over handwriting exemplars to the grand jury. This is patently untrue and must be corrected for this Court. Such delay was by the government.

1. Neither William E. Seekford nor Leonard Kamaras, counsel for Petitioners before the trial court, are presently involved in the grand jury proceedings in Massachusetts. Attorney John Sheehan co-counsel here in conjunction with Stephen Fortunato are the counsel for Petitioner Guarino and other persons in that proceeding. These counsel and Petitioner Guarino deny any delay attributable to them and recite the following facts.

Initially, the government took no action with respect to the grand jury proceeding for a period of some six months. No notification was given to Guarino from late June, 1978 until late January, 1979. This was true although the first notification of the need for handwriting exemplars was made in May of 1978.

On three separate occasions thereafter from late January, 1979, Petitioner together with other parties and counsel, traveled from Providence to Boston only to be sent home since

no quorum of the grand jury was present. On two other occasions the government notified Guarino and his counsel not to go to Boston as the quorum was not present. It became so bad that Assistant United States Attorney Charles E. Chase informed Mr. Fortunato to call Boston before making another fruitless trip.

In early March, 1979 Petitioner Guarino and two other people objected to the handwriting exemplars for various reasons. As a result, on March 12, 1979 those parties together with four other persons appeared before the Honorable Judge Freedman in the District Court of Massachusetts. Four persons agreed to give the exemplars. Guarino and two others objected.

The Judge wanted to know the reason for the delay. The government alleged that the parties had failed to come to Boston, as requested, to give the exemplars. When shown the several trips and the other cancelled trips the Court granted a delay of his order for 48 hours so that the three objecting parties could apply to the Court of Appeals for the First Circuit. The application was promptly filed but denied on the second day, March 14, 1979. The same day Mr. Fortunato had delivered a letter to Judge Freedman advising that the three objecting parties would give the exemplars as requested.

On March 21, 1979 Mr. Chase notified Guarino's counsel by telephone to again come to Boston on March 27, 1979. Mr. Fortunato on March 22, 1979 by registered mail requested to have all government requests made in writing so as to avoid future claims of delay. No written notice was received by Petitioner, however on March 27, 1979 an arrest warrant for contempt was obtained by the government. Petitioner, upon hearing this, on April 2, 1979 appeared without subpoena and gave the exemplars.

Therefore, if Petitioner Guarino was guilty of any delay for asserting his rights and seeking to prevent the numerous trips to Boston upon verbal requests when no grand jury quorum was present, such delay could only possibly lay between March 12, 1979 and April 2, 1979 long after this Petition was filed. On the other hand the government did virtually nothing during the remaining year and still states it will continue to possibly July of this year. Therefore, it is incorrect to blame this Petitioner with "much of the delay."

2. Next the government criticizes Petitioners for not filing a Rule 41(e) motion in Massachusetts for 13 months simultaneous with the Rhode Island Motion.

Rule 41 provides that aggrieved parties may file their motion in the District of seizure. This provision permits one to present his claim locally and where the seizure occurred and does not require them to travel to other states to vindicate his rights.

In this case there are no pending criminal charges so there is no district of trial in which to file such a motion. Again the government seeks to avoid the clear language of the rule. In addition what benefit is there to the government or judicial economy to fully try a Rule 41(e) motion, not make a decision, then tell the aggrieved party to file a new one in another state and re-try the entire matter a second time. Similarly, once the prompt Rule 41(e) motion was filed but not concluded these Petitioners cannot conduct two distinct simultaneous identical proceedings seeking the same relief in two separate federal districts. Since inception, this proceeding has been fully viable and not concluded to this date. How then does the government suggest the new identical proceedings could be commenced.

3. The government states (pp. 5, footnote 4) that Petitioners were given the right to obtain copies of the records free of charge, which offer was not taken up by Petitioners. This again is not the case as will be set out here.

Attorney William Seekford here, received a letter from Charles W. Chase, Assistant United States Attorney on Wednesday, April 4, 1979 when he returned to his office in Baltimore. It had been delivered on Monday, April 2, 1979 at a time when Mr. Seekford was in Providence and was dated March 29, 1979. This letter states that he had just learned that the Petitioners sought the seized materials return and access to copies thereof and that he had possession of them and was conducting the grand jury proceeding. This letter acknowledges that Mr. Chase was familiar with the claims presented to this Court and he wished for the first time to make the records available at no cost although it is their policy to require payment for photocopying. A copy of their letter was sent to the Solicitor General.

Three days later, on April 7, 1979 the Solicitor General's Brief in Opposition was delivered by mail to counsel's office. In the footnote it is asserted that through conversation with the government and counsel for Petitioners that such records were available without cost but no records were thereafter sought. The offer was given as a stated fact.

Counsel of record interviewed attorneys John Sheehan and Stephen Fortunato involved in the Boston proceeding. No such offer was ever given them until they read Mr. Chase's letter. That is also true of Mr. Seekford, counsel herein.

In addition, on June 8, 1978 Petitioners filed, as exhibits, letters between counsel and both federal and Rhode Island

state government asking for extensions with respect to tax reports and returns, and letters of rejection as to the requests.

Petitioners, meanwhile, met with the I.R.S. and counsel in May of 1978 and reached a compromise for estimated tax returns subject to future correction when the records would be made available.

Attorney Leonard Kamaras, in mid-March 1978 requested to obtain records which were necessary for government reporting and to continue dissemination. Their request was made initially to Robert C. Power, Assistant U.S. Attorney who is directly involved in the Boston matter and who was present during the seizure. Mr. Power suggested writing to the federal authorities citing the government seizure and request extensions. This was done but rejected. Copies of the requests and rejections were filed in the federal Court.

Further, someone of the federal prosecutors had agreed that, approximately 100 pages (2 sides to each page) of certain payroll information from January 1, 1978 through February 28, 1978 would be made available. They had taken such a long time that Petitioners met with the I.R.S. as set out above and in May of 1978 reached a compromise as to averaging out prior figures. When the records came to Providence thereafter a demand of $69.00 was made for photocopying these few pages. Due to the delay no copies were made.

At no time up to well after filing this Petition has the government given Petitioners open access to the records. Only specifically designated documents would be made available and not review of these records by Petitioners was provided. And at no time was it to be granted without payment until the filing of the government brief herein.

CONCLUSION

The facts and statement of the government is misleading to the Court. This reply brief is filed to correct these inaccuracies.

It is noteworthy that the two named F.B.I. officers in the motion below were assigned to the Boston office. It is inconceivable therefore that the federal prosecutor in Boston who appeared and opposed even disclosure of the search Order affidavit did not know Petitioners sought the seized materials when this matter was taken all the way to this Court for resolution. Ironically the offer came after this Petition.

Petitioners respectfully request this Court to require the District Court not to sit upon the rights of Petitioners by directing the Court of Appeals to issue its Writ of Mandamus, to do otherwise is to abandon the tenets of Rule 41(e) and to fail to recognize the fragile position of federal First and Fourteenth Amendment rights under these circumstances.

Petitioners ask this Court to consider the following. First, if the Boston affidavit was sufficient why was it kept suppressed for a year not only from these Petitioners but also the federal trial court. Secondly, what possible harm can the government receive from a judicial determination if the seizure was valid in all respects. Third, why has the government now, after some 14 months and after this Court is considering these claims, decided to allow access to the materials and copying at no cost when such a claim is pending here. Fourth, how could the Assistant United States Attorney in Boston not know of the request for access and copies when that assistant appeared in Court in Boston and openly and successfully

fought against disclosing the affidavit and has as well worked on the investigation with the two investigating F.B.I. agents who were named originally or Defendants and testified below as to the claims and with Assistant U.S. Attorney Powers who participated otherwise and was in court. Finally, is the Federal Rules of Criminal Procedure a mandated control for the government as well as civilian litigants or merely a guide to informed discretion or has been the case here.

Respectfully submitted,

WILLIAM E. SEEKFORD, Esq.
Suite 1302 Towson Towers
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6868
Counsel for Petitioners

JOHN SHEEHAN, Esq.
906 Industrial Bank Building
Providence, Rhode Island 02903
(401) 351-1190
Of Counsel,
For Petitioners